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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED CHURCH OF THE MEDICAL CENTER, an Illinois religious corporation, **THE UNITED METHODIST BISHOP OF THE CHICAGO AREA**, et al.,

Petitioners,

v.

STATE OF ILLINOIS MEDICAL CENTER COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. INTRODUCTION

Exposing the basic weakness of its case on the merits, Respondent Medical Center Commission devotes most of its opposition brief to a faulty procedural attack aimed at avoiding review by this Court. Respondent contends that: (a) Petitioners waived their Federal Due Process objection in that "the Illinois Appellate Court did not consider any Constitutional questions because the Petitioners raised none below". (Brief in Opp. at 6); and (b) the Appellate Court's remand to the trial court for prove-up of

severance damages to the Church's remainder property renders the issue of just compensation unreviewable under the finality requirements of 28 U.S.C., Section 1257(3). (Brief in Opp. at 8-10) Finally, Respondent suggests that under its governing statute it is unable to determine what is to be done with the Church's parking lot until after completion of the condemnation when a "use value" hearing can be held. (Brief in Opp. at 4)

As will now be shown, Respondent's factual assertions are demonstrably untrue; its legal position concerning finality is erroneous and contrary to the teachings of this Court in closely analogous cases. The case is ripe and must be heard in its entirety.

II. ARGUMENT

1. Petitioners' Claim That The Commission's "Conflict Of Interest" Violated Federal Procedural Due Process Was Timely, Explicitly And Continuously Made At All Stages Of The State Court Proceedings.

The fact that the Illinois Courts skirted the serious due process problem of this case resulting from the official role of Rush's own attorney and two other affiliated Commissioners, surely does not mean that Petitioners were remiss in their duty to raise the issue. The Appendix attached, containing excerpts from the Church's pleadings and briefs wholly refutes Respondent's contentions. It clearly shows that the Church claimed deprivation of its federal right to procedural due process at the earliest possible moment during the trial court proceedings after it learned, through discovery, of the conflict of interest. (Excerpts from Second Amended Traverse and Motion in support of filing same in Appendix below at A-1; Third Amended Traverse

at Paragraph 3, Appendix below at A-3 - A-4; Reply filed with trial court on February 1, 1982 at Page 17 *et seq.*, Appendix below at A-3) Thereafter, it repeatedly renewed the issue.

Respondent's contention that ". . . the Petitioners failed to raise any federal or constitutional grounds in the review before the highest court of the State . . ." (Brief in Opp. at 7) once again misinforms this Court. Petitioner repeatedly pressed the federal due process issue in its state appeals including *two* attempts to raise the point in the Illinois Supreme Court. In the Church's Petition for Leave to Appeal to the Illinois Supreme Court, it pointed out that the conflict of interest which had "fatally infected" the Commission's condemnation procedure offended "due process" and it cited federal and state cases dealing with federal due process requirements. (Appendix below at A-6)

When the Illinois Supreme Court summarily denied review, Petitioners tried yet another time to call to that Court's attention the federal due process implications of the egregious conflict of interest here at issue:

> This direct conflict of interest [Rush's attorney's role] not only resulted in a *gross deprivation of property without due process of law under federal and state constitutional standards*; it also resulted in a violation of Illinois statutory law which this court surely must have overlooked (emphasis added). (Appendix below at A-6).

Respondent Commission is wrong once again when it claims that the Church failed to assert the issue before the Illinois Appellate Court. First, the record which the Church caused to be filed before the Appellate Court contained numerous important filings before the condemnation trial court which repeatedly complained that federal due process rights had been violated. (Second Traverse

and Motion attached; Third Amended Traverse and Reply of February 1, 1982, Appendix below at A-3 and A-4) These were not merely minor documents hidden within the record; rather, they constituted the Church's fundamental pleadings central to the case. Moreover, the Church affirmatively sought in its brief to draw those basic pleadings to the Appellate Court's attention. In a portion of the Church's Appellate Brief conveniently *omitted* from the Respondent's Appendix purporting to contain the "entire text" of the Church's presentation to the Appellate Court, the Church said:

> "*The Ties Between Certain Commissioners and Rush* . . . the record shows that three (3) of the Commissioners who authorized the condemnation, Messrs. Livingston, Hoffman and Roach, have important links to Rush, *matters duly raised by the Church in its traverses.*" (emphasis added). (Appendix below at A-5).

Immediately thereafter, the Church invited the Appellate Court to:

> . . . *see* Second Amended Traverse at Page 3, Paragraph A (C-71); Reply Memorandum . . . at Page 4, *et seq.*, (C-134); and Third Amended Traverse at Pages 2-3 (C-197)." (emphasis added). *Id.* at A-5.

All of these basic pleadings filed with the Appellate Court and cited in the Church's Brief to that court are laced with federal due process arguments and citations as shown earlier.

Petitioners' appellate court argument heading ("The Condemnation Proceedings are Fatally Infected with Administrative Bias and Conflict of Interest") concededly failed to repeat the talismanic words "due process" but its thrust could scarcely be mistaken given the strong due process foundation that had been laid in the record and pleadings placed before the Appellate Court. Further, the

state court decisions cited by the Church immediately under that argument heading were in essence due process cases. Included among the authorities cited and quoted by the Church in its brief was *City of Naperville v. Wehrle*, 340 Ill. 579 (1930) which, in turn, adverted to *Tumey v. Ohio*, 273 U.S. 510 (1926), a leading due process case of this Honorable Court. (340 Ill. at 581; Petitioner's Brief to Illinois Appellate Court at 38, Appendix below at A-5)

Clearly, there has been no waiver. The attached Appendix of the Church's incessant efforts to uphold its federal due process rights in state court speaks for itself and is dispositive.[1] The Church should not be held to have waived its rights simply because the Illinois judiciary chose to give a shallow, non-constitutional treatment to the serious federal issues which it raised.

2. All Issues In This Appeal, Including The Church's Constitutional Right To "Just Compensation" By Way Of Provable Severance Damages Are Effectively Final And Ripe For Review On Certiorari.

Respondent maintains (Brief in Opp. at 8) that the "just compensation" issue of this appeal is lacking in finality and unreviewable because the Appellate Court remanded that portion of the case to the trial court to hear proof of severance damages, if any, to the Church's remainder. This overlooks the fact that the remand in question has been rendered a meaningless exercise and formality for

[1] Contrary to Respondents claim, (Brief in Opp. at 7) Petitioners did not fail to observe Rule 21.1(h) which requires specification of their efforts to raise federal issues below. Such specification, including many of the Church's pleadings excerpted in the attached Appendix, was duly set forth in the Church's Petition for Certiorari at page 14. Likewise, a second specification dealing with the just compensation issue of federal constitutional law appeared at page 16.

the Church because its request for disclosure of the Commission's plans (an essential prerequisite to proving severance damages to the Church's sanctuary) has been *rejected* at all levels of the state judicial system.

Knowledge of the condemning authority's purpose may not be vital information for an owner whose whole property is being taken since he can ascertain and recover the fair market value of the total parcel *regardless* of its future anticipated use.[2] However, where, as here, a portion of the owner's property is taken away and the owner continues in possession of the adjoining property, knowledge of future use becomes crucial. Without it, the owner cannot deduce what injury will be inflicted upon his remainder and is incapable of proving up severance damages which are an integral part of his federal constitutional right to just compensation. Like the federal due process issue, this issue was duly and repeatedly raised in the courts below. (First Amended Traverse; Appendix E to Petition for Certiorari; Brief to Appellate Court at 33-36; Reply Brief to Appellate Court at 8; Petition to Illinois Supreme Court for Leave to Appeal at 25-28, 34-35).

Herein lies the "just compensation" dilemma in the present case and the reason for its practical finality. The Illinois court has ordered the remand, but in the same opinion has refused to require any disclosure of intended use, thus depriving the Church of its ability to recover *any* compensation during that remand hearing. Thus, since the outcome of the remand is pre-ordained under the Appellate Court's guidelines, the decision is effectively a final

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[2] This Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), cited by Respondent as authority for "planless" condemnations (Brief in Opp. at 10) are inapposite. Neither case involves the right to severance damages in a partial condemnation, the situation confronted in the case at bar.

one, satisfying the prerequisite for this Court's jurisdiction under 28 U.S.C., Section 1257.

It has long been held by this Court that the requirement of finality is to be given a "practical rather than a technical construction". *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528 (1948); *Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 8 L. Ed. 2d 510 (1962). Here, as a *practical* matter, the Church's six-year quest to find out what will be done with its parking lot is over, having been resolved adversely by the Illinois Courts. The issue is foreclosed and the legal ground rules for the remand have been set on terms intolerable to the Church. All efforts to prove-up severance damages under these conditions will be futile as will be any post-remand effort to gain relief from the same state court system which has already denied it. It simply makes no sense to ask the Church to return later to the same reviewing courts where it has been repeatedly rebuffed on the same question of "disclosure of purpose."[3]

Because remand on the terms set by the Illinois Courts would put the Church in a hopeless position relative to proof of severance damages, the instant case therefore squarely fits within the category of cases where immediate review ". . . is fundamental to the further conduct of the case". *United States v. General Motors Corp.*, 323 U.S. 373, 377, 89 L. Ed. 311 (1944). Although it did not deal with severance damages, *General Motors*, a condemnation case, is in other respects strikingly similar to the instant case. There, as here, the occupant of property sought review of an adverse determination concerning the

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[3] In fact, separation of the "just compensation" issue from the due process issue in the instant appeal would actually *promote* piecemeal review in violation of one of the chief aims of the finality rule (*cf. North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 38 L. Ed. 2d 379, 383 (1973).

scope of its right to just compensation. There, as here, the appellate court remanded the case for a trial on compensation damages in accordance with its ruling. In granting review, this Court recognized that a proper framework of controlling constitutional principles defining just compensation should be laid down before, not after the compensation trial:

> "We think that we should review that ruling [on scope of just compensation] *inasmuch as it is fundamental to the further conduct of the case.* The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: 'nor shall private property be taken for public use, without just compensation . . .' " (emphasis added) 323 at U.S. 377.

Other decisions involving remands or continuing state court proceedings of one kind or another also support the Church's position that the case is final. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 340 (1975), this Court described as reviewable:

> ". . . those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the *outcome of further proceedings pre-ordained.* In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." (emphasis added) 420 U.S. at 479.

To the same effect, see *Mills v. Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484 (1966) (remand of state criminal case no bar to review where Appellant would have no remand defense other than his federal claim and could not prevail at trial on existing facts or any non-federal ground); *Construction Laborers v. Curry*, 377 U.S. 542, 550, 9 L. Ed. 2d 514 (1963) (appellant had no recourse on remand other than the federal claim already ruled upon adverse-

ly in state court case; matter for all practical purposes thus concluded). There is nothing further to be litigated in state court on the basic federal question of just compensation. Review of this pressing question must not be postponed.

3. The Respondent Commission's "Use Value" Hearing Procedure Under The State Medical Center Act Does Not Require That The Commission Condemn Now And Decide Later How A Parcel Is To Be Used.

In an apparent effort to explain why it has withheld from Petitioner Church any plans or information as to the real purpose of the taking for over six years, the Commission points to Section 6 (Illinois Revised Statutes, Chapter 111½, Section 5009) of its enabling statute (Brief in Opp. at A-6) and implies that it is somehow bound to await completion of the condemnation procedure before it holds a "use value hearing" to formalize its intentions. This is not so. There is not a word in the statute which requires that such an action be deferred. Indeed, past practice involving numerous prior condemnations within the medical center district demonstrates that designation of use and users can and has been made before and during, as well as after completion of condemnation proceedings in court. (Defendant's Exhibit No. 5)

When the fundamental right to prove severance damages as a part of just compensation is at stake, in a partial taking, the use value hearing *must*, indeed be completed before the court case is over. The refusal of disclosure which occurred here is unexplained and inexcusable.

Finally, the Appellate Court's and Respondent's suggestion that the "conflict of interest" here at issue can be cured during a future "use value" hearing by a mere objection by the Church to a formal transfer of the property to Rush (slip opinion in Appendix to Petition for Cer-

tiorari at A-7) is untenable. Such a theoretical right of the Church, *in the future*, to contend that some user *other* than Rush should be awarded the property because of the collusion here at issue would be cold comfort, to say the least, *after* the Church has already irrevocably lost its property.

Plainly, the Commission has capriciously delayed its disclosure of a purpose for the instant taking, either to confound the Church and frustrate its efforts to secure just compensation or, to conceal the Commission's *sub rosa* arrangements with Rush.

CONCLUSION

For all of the reasons stated above, the Petition for Writ of Certiorari should be granted. The two important federal constitutional issues raised therein were explicitly raised in the state courts, are ripe for determination and should be taken together, not bifurcated under a strained application of the finality doctrine.

Respectfully submitted,

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APPENDIX

Excerpts From Pleadings And Briefs By Petitioners, United Methodist Bishop, et al., In The state trial, Appellate And Supreme Courts Pertaining To Issue Of Disqualifying Conflict Of Interest From The Standpoint Of Due Process Of Law:

". . . such . . . process is totally tainted by improper dealings and collusion between the Petitioner Commission and Rush Presbyterian St. Lukes Hospital, the putative taker of defendants' properties. The dual attack on defendants' property rights which is flawed by the Hospital's unlawful domination of Petitioner, a public agency, and which would *flagrantly deny defendants their rights to due process of law,* is more specifically described as follows:

A. The resolutions enabling and authorizing the Commission to condemn this property were procured by Rush Presbyterian St. Lukes Hospital through its collusion with, and domination of, the Commission rather than by a fair, independent, deliberative process as required by *due process of law as provided in the Fourteenth Amendment to the United States Constitution.*"

Second Amended Traverse of Petitioner Church at par. 3, filed with trial court April 15, 1981 and filed as part of record with Illinois Appellate Court (Item C-71) on January 11, 1985. (emphasis added).

* * *

"3. The instant Traverse and Motion (Second Amended) is made necessary by information learned through discovery in this matter and a companion matter now pending in the Federal Court (*United Church of the Medical Center v. Medical Center Commission and Raymond J. Bayster*, Northern District of Illinois, Eastern Division, Case No. 80 C 4617) which raises *serious constitutional issues not before presented* as are more fully set forth in the Second Amended Traverse and Motion to Dismiss."

Motion for Leave to File Second Amended Traverse at par. 3, filed with trial court on April 15, 1981 and filed as part of record with Illinois Appellate Court as (Item C-68) on January 11, 1985. (emphasis added).

* * *

"A. THE ENABLING RESOLUTIONS FOR CONDEMNATION ARE INFECTED BY CONFLICT OF INTEREST, AND THEY ARE VOIDABLE *AS A MATTER OF DUE PROCESS.*

The record shows that three of the sitting Commissioners, Roach, Livingston and Hoffman, have important links to the Hospital. Commissioners Livingston and Hoffman are top officers of the Chicago Foundlings Home, which is an affiliate operating out of the premises of the Hospital. Roach was, until sometime in 1979, an employee of the Hospital acting as its principal legal counsel. (Appendix D attached at Par. 2)

* * *

"Both Illinois and *Federal* cases have long condemned the undermining effect which conflict of interest and bias bring to bear upon the administrative process. [citations omitted].

* * *

Federal decisions likewise condemn conflicts of interest similar to those presented in the case at bar. See *Trans-World Airlines v. Civil Aeronautics Board*, 254 F.2d 90 (D.C. Cir. 1958) (former attorney for litigant later became Commission of Board hearing case involving litigant); also, *American Cyanamid Company v. F.T.C.*, 363 F.2d 757 (6th Cir., 1966) (former attorney for Senate Committee investigating drug companies later became chairman of F.T.C. and participated in decision against such companies)."

[Additional federal citations omitted] Excerpts from pp. 7-8 of Reply filed by Petitioner Church with trial court on October 12, 1981 and filed as part of record with Illinois Appellate Court (Item C-134) on January 11, 1985. (emphasis added).

* * *

"2. In addition to all other grounds previously alleged concerning the violation of Defendant's *due process* and First Amendment rights, the Commission was and is incompetent to authorize the instant condemnation by reason of the facts that (a) Commissioner Roach was Vice President for Legal Affairs and Assistant Secretary to Rush-Presbyterian St. Luke's Medical Center as disclosed in his ethics statement for 1980, copy attached hereto and incorporated herein as Exhibit B, and received income in

excess of $5,000 in legal representation of Rush-Presbyterian St. Luke's Medical Center as disclosed in ethics statement for the year 1981 . . ."

Third Amended Traverse of Petitioner Church at par. 2, filed with trial court on Feb. 1, 1982 and filed as part of record with Illinois Appellate Court (Item C-197) on January 11, 1985. (emphasis added).

* * *

"THE CONDEMNATION PROCEEDINGS ARE *FATALLY INFECTED* WITH ADMINISTRATIVE BIAS AND CONFLICT OF INTEREST."

Argument Heading "B" of Petitioner Church's Brief to Illinois Appellate Court filed January 11, 1985. (emphasis added).

* * *

"A statute which compels the litigant to submit his controversy to a tribunal of which his adversary is a member makes his antagonist his judge and *does not afford due process of law.*" (emphasis added).

Excerpt from *Commissioners of Drainage District v. Smith*, 233 Ill. 425-426 (1908) cited by Petitioner Church in Heading B of its Brief to Illinois Appellate Court filed January 11, 1985.

* * *

". . . it is the general rule, even apart from statute, that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided. (*Tumey v. Ohio*, 273 U.S. 510 . . .)"

Excerpt from *City of Naperville v. Wehrle*, 340 Ill. 579 at 581 (1930) cited *and* quoted by Petitioner Church in Heading B of its Brief to Illinois Appellate Court filed January 11, 1985. [additional argument and citations omitted].

* * *

"E. The Ties Between Certain Commissioners And Rush.

The record shows that three of the sitting Commissioners who authorized the condemnation, Messrs. Livingston, Hoffman and Roach, have important links to Rush, matters duly raised by the church in its traverses. *(See Second Amended Traverse at p. 3, par. A (C-71); Reply Memorandum in Support of Second Amended Traverse at p. 4, et seq., (C-134); and Third Amended Traverse at pp. 2-3, (C-197).)"*

Petitioner Church's Brief to Illinois Appellate Court at p. 22 directing that Court's attention to the Church's principal trial court pleadings raising federal due process deprivations. (emphasis added).

* * *

"THE CONDEMNATION PROCEEDINGS ARE FATALLY INFECTED WITH ADMINISTRATIVE BIAS AND CONFLICT OF INTEREST AND SHOULD THEREFORE BE INVALIDATED.

It is elementary that the administrative process must provide both fairness and the appearance of fairness where, as here, a governmental agency or commission is empowered to make determinations which directly affect fundamental rights of individuals. *Due Process* demands a disinterested decisionmaker to assure fairness. See *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F.2d 260 (D.C. Cir. 1962)."

Excerpts from argument Heading B of Petitioner Church's Petition for Leave to Appeal to Illinois Supreme Court (p. 28) filed May 5, 1986. [additional argument and citations omitted].

* * *

"This direct conflict of interest [Rush's attorney's role] not only resulted in a *gross deprivation of property without due process of law under federal and state constitutional standards*; it also resulted in a violation of Illinois statutory law which this Court must surely have overlooked."

Petitioner Church's Motion to Illinois Supreme Court for Leave to File Motion to Reconsider Denial of Review filed November 15, 1986 at p. 6. (emphasis added).